



IN THE LABOUR COURT, JOHANNESBURG

Case no: JR 990/14

Not Reportable

In the matter between:

FUTURES GROUP INTERNATIONAL

(FUTURES GROUP GLOBAL OUTREACH INC.)

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

WILLEM KOEKEMOER

Second Respondent

SEAKGAMOTHO PERCY MATHABATHE

Third Respondent

Heard: 29 April 2015

Delivered: 26 May 2015

Summary: Employer purporting to rely on fixed term contract when not renewing the contract but giving evidence to the effect that the terms of the project had changed and that was the reason the contract was not renewed. Arbitration award not reviewable.

JUDGMENT

GUSH J

- [1] This is an application to review and have the arbitration award dated 10 May 2014 made by the second respondent under case number GATW11791/13 set aside.
- [2] The applicant had employed the third respondent on 23 May 2012 on probation and, at the successful conclusion of his probationary period, employed the third respondent on a fixed term contract for a period of 12 months on 20 September 2012. The third respondent was employed as a technical officer in the sexual HIV prevention project.
- [3] On 19 August 2013, the applicant's Human Resources Manager, on the instructions of the applicant's Chief of Party, handed the third respondent a letter of the same date in which letter, the applicant advised the third respondent "further to the fixed term contract which commenced on 23 May 2012 and terminates on 19 September 2013, it is with regret that we inform you that the contract will not be renewed due to operational reasons."
- [4] Dissatisfied with his "dismissal", the third respondent referred a dispute to the first respondent regarding his alleged unfair dismissal on the grounds that he had been advised on 18 April 2013 that his contract would be renewed.
- [5] At the commencement of the arbitration, the second respondent recorded that the issue to be decided was
- 'Whether the [3rd respondent] was indeed dismissed when he was informed that his fixed contract would not be renewed; and
- Should the finding be that the [3rd respondent] was indeed dismissed, whether such dismissal was fair as envisaged by the Labour Relations Act.'¹
- [6] The second respondent in addition under the heading "*Points In Limine*" recorded the applicant's averment that the first respondent did not have jurisdiction on the grounds that there had been no dismissal.
- [7] At the conclusion of the evidence, considering the argument and analysing the evidence and argument the second respondent concluded

¹ Arbitration award para 14 and 15 pleadings page 23.

'Taken on a balance of probabilities, subjectively as well as objectively speaking the [3rd respondent] had a reasonable expectation that his fixed term agreement would be renewed and it was not renewed as provided for in section 186(1)(b) of the Labour Relations Act.

The applicant established a dismissal and the respondent failed to prove that the dismissal was fair.'²

[8] The applicant records in its founding affidavit that it adduced the following evidence at the arbitration:

- a. Ms Ngcobo, the Human Resources Manager of the applicant testified that she was instructed by [the Chief of Party Ms Macharia] on 19 August 2013 to notify the third respondent that his **contract would not be renewed.** (my emphasis)³
- b. Ms Macharia, the Chief of Party who heads the Sexual HIV Prevention Project testified that only after consultation with the applicant's funder was she in a position to offer employment depending on the focus and needs of the project. She testified that the reason for the non-renewal of the third respondent's fixed term contract was due to a refocus of the project and operational reasons. The position of the third respondent as technical officer was no longer required.⁴

[9] The third respondent in his evidence before the second respondent averred that during a meeting on 18 April 2013, the Deputy Chief of Party, Ms Pillay, had advised the employees that the renewal of fixed term contracts would be based on individual performance and that all fixed term contracts would be renewed. This evidence was denied by the applicant's witnesses. The basis of the denial however was that Pillay did not have the authority to give this undertaking. Pillay in her evidence did not deny giving such an undertaking but simply indicated that she could not remember or recall such a discussion.

² Arbitration award para 78 and 79 pleadings page 31/2.

³ Founding affidavit paragraph 20 page 9.

⁴ Founding affidavit paragraph 21 page 10.

- [10] The applicant raises seven grounds of review. The first six grounds of review deals with specific paragraphs in the second respondent's award under the heading Analysis of the Evidence and Argument.⁵
- [11] The first ground of review concerns the finding by the second respondent that the third respondent added value to the project and that his services could have been required beyond the date of the end of his contract. This, the applicant avers, constituted a gross irregularity.
- [12] The second ground of review concerns the finding by the second respondent that the third respondent's supervisor and colleagues were surprised by the non-renewal of his contract as there was no prior consultation and that this constituted a gross irregularity.
- [13] The third ground of review concerns the second respondent's conclusion that the applicant had a duty to advise the third respondent of the change in the project required by the Department of Health (the so-called operational reasons that lead to the non-renewal of the contract). The applicant avers that there was no duty to consult the third respondent on these operational reasons and that his contract "would come to an end on 19 September 2013". This the applicant avers constituted a gross irregularity on the part of the second respondent.
- [14] The fourth ground of review concerns the second respondent taking into account that the Sexual HIV Prevention Project program was an ongoing programme and that this had a bearing on the third respondent's legitimate expectation of the renewal of his fixed term contract. This the applicant avers constituted a gross irregularity.
- [15] The fifth ground of review concerns the second respondent's consideration of the fact that the project was still funded and that all other staff members were offered renewal of their fixed term contract for another year. The second respondent found this to be an indicator that the third respondent had an expectation that his contract would be renewed. Not only does the applicant

⁵ paragraphs 72, 73, 74, 75, 76, and 77 respectively.

regard this as a gross irregularity, in addition, under this ground, the applicant surprisingly avers that by notifying the third respondent of the non-renewal of his fixed term contract one month before it was to expire it “would have dispelled the third respondent’s alleged expectation that his fixed term contract would be renewed”. This, the applicant suggests is evidence that the second respondent failed to properly apply his mind to all the evidence presented at the arbitration.

- [16] The sixth ground of review concerns the second respondent’s conclusion that the applicant’s evidence that the reason for not renewing the third respondent’s contract was due to operational reasons and thereafter to effluxion of time is contradictory. This finding by the second respondent, the applicant suggests, evinces a gross irregularity.
- [17] The seventh ground of review is that the second respondent erred in concluding that the third respondent was dismissed and that this constituted a conclusion that no reasonable Commissioner would arrive at as “the third respondent failed to provide a single reason why was he under the impression that his contract would be renewed” (sic).
- [18] In the supplementary affidavit filed under rule 7A(8) (a), the applicant qualifies the seventh ground of review by substituting the word “erred” with the words “gross irregularity” and adds to the grounds of review in similar vein to the original grounds of review. These grounds take the matter no further.
- [19] The applicant does however, somewhat incomprehensibly, suggest that the relief granted by the second respondent is unreasonable *inter alia* because the applicant is a non-profit USA funded Corporation and that the applicant must accordingly mould its programmes in accordance with the needs of the stakeholders.
- [20] Taking the applicant’s grounds of review in in context, it is apparent that the applicant is simply appealing against the finding of the second respondent that the third respondent had a reasonable expectation that his contract would be renewed and that the applicant failed to renew it.

[21] Logic dictates that in circumstances where the applicant stated that the reason for the non-renewal of the third respondent's contract was due to operational reasons, despite the fact that it was a fixed term contract, it is probable that had the operational reasons not arisen the contract would have been renewed. This is particularly so given the evidence the applicant adduced at the arbitration regarding the meeting in April where the third respondent avers that the employees were advised that their contracts would be renewed.

[22] In addition to this the applicant records in its founding affidavit that the third respondent was advised that his "contract would not be renewed". If the applicant had not led the third respondent to reasonably believe his contract would be renewed or created the impression that that the contract would be renewed this would not have been necessary. The applicant would have relied solely on the expiry of the fixed term contract.

[23] The question however to be determined is whether the award of the second respondent is reviewable. The test to be applied was restated in the matter *Goldfields* as follows:

The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?⁶

[24] In this matter, it is abundantly clear that the award satisfies this test. The second respondent:

clearly identified the dispute and the issues;

⁶ *Gold fields Mining South Africa (Pty) limited (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC) at para 20.

understood the nature of the dispute and dealt with the substantial merits of the dispute; and

crucially the decision of the third respondent is clearly one that an arbitrator could reasonably have arrived at based on the evidence adduced at the arbitration.

[25] It is unclear from the applicant's papers what gross irregularities the applicant relies on other than its disagreement with the conclusions reached by the second respondent. The issues raised by the applicant to justify the so-called irregularities are no more than an ill disguised attempt at an appeal.

[26] The parties agreed that costs should follow the result.

[27] For the reasons set out above, I make the following order:

The applicant's application is dismissed with costs.

D H Gush

APPEARANCES:

FOR THE APPLICANT:

Ms. L Cheroux

Instructed by Stanley Moldt Attorneys

FOR THE THIRD RESPONDENT:

Mr. H Gerber

Instructed by Welman Attorneys